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BOOKS RECEIVED

Language on the Job: Balancing Business Needs and Employee Rights. By Bill Piatt. Albuquerque, N.M.: The University of New Mexico Press. 1993. Pp. 169. Hardcover. \$27.50.

Due to recent demographic and economic changes in the United States, the American work force has begun to experience a tremendous influx of minority workers, many of whom have limited or no proficiency in English. For employers, unions, and employees, these new workers bring with them potential problems related to the use of language on the job. Employers with "English-only" or restrictive language policies for purposes of hiring and promotion face potential liability under federal laws prohibiting race and national origin discrimination in the workplace. Unions run the risk of breaching their statutory duty of fair representation under the National Labor Relations Act (NLRA) when conducting representative elections and meetings in English only. For non-minority employees, these new workers raise both job safety and efficiency issues. On the other side of the scale, those with limited or no English stand to be discriminated against when the ability to speak English is not related to job performance. Some of these workers have begun to assert their linguistic rights in court. Their efforts, however, have produced inconsistent results.

Language on the Job: Balancing Business Needs and Employee Rights (hereinafter "*Language on the Job*") proposes means by which the legal system and employers might better respond to "language-on-the-job" issues. Throughout the book, author Bill Piatt brings his previous writings on law and language to bear on his analysis of the legislative and judicial approaches to these issues. Chapter One first discusses how non-English speaking workers have historically been treated in the U.S. and then predicts how the current marketplace will respond to the increased the number of "foreigners" and bilinguals entering the American work

force. Chapters Two through Five provide an overview of several language-on-the-job issues which have been inconsistently resolved by the courts in their attempt to "pigeon-hole" these issues into race or national origin categories. The last section of the book, Chapters Six and Seven, attempt to present the legal system with a fuller understanding of language itself from a sociological-linguistic point of view, and then suggest ways to accommodate the competing interests of managers, unions and employees.

Piatt begins Chapter Two with the caveat that the development of jurisprudence has been "inconsistent, reflecting societal ambivalence about accommodating other tongues and their speakers and reflecting the confusion of monolingual judges and legislators over the very nature of language itself." With that, he proceeds to outline the courts' application of the three main federal statutes that provide protection against discrimination based upon English speaking ability: Title VII of the Civil Rights Act of 1964, the Immigration Reform and Control Act of 1986 (IRCA), and 42 U.S.C. section 1981.

Piatt's analysis of case authority concludes that Title VII and 42 U.S.C. § 1981 make it fairly easy for workers harmed by English proficiency requirements to make *prima facie* cases of discrimination. He maintains, however, that the IRCA affords minimal protection to non-English speaking plaintiffs since its "employer sanctions" provision, penalizing employers who knowingly hire unauthorized aliens, makes employers reluctant to hire foreign-speaking workers at all.

Chapter Three examines language-on-the-job issues in the context of communication among employees in the workplace. Here, too, the decisions and legislation referred to suggest that there is an increased sensitivity to language issues among judges and legislators. Piatt primarily focuses on recent guidelines issued by the Equal Employment Opportunity Commission (EEOC) creating a presumption that rules requiring only English be spoken in the workplace violate Title VII as national origin discrimination, as well as a recent Ninth Circuit Court of Appeals case expanding the right of a worker to use a language other than English on the job. The chapter goes on to describe how the marketplace, with its increasing number of consumers who do not speak English, is

also beginning to limit the application of "speak-English only" rules on the job.

The rights of bilingual and multilingual workers are discussed in Chapter Four. In the few cases brought so far, the courts have upheld the ability of an employer to require bilingual employees to use their language skills on the job in communicating with customers. At the same time, they have held that an employer engages in unlawful national origin discrimination if the employee loses opportunities for promotions or positive evaluations. For Piatt, several issues remain unresolved. For example, he suggests that an employer may be in breach of contract by failing to bargain for or to compensate the use of an employee's language skills.

Chapter Five addresses two language issues in the context of the union-employee relationship: whether ballots for union election must ever be printed in languages other than English and whether unions must accommodate non-English speaking workers in union meetings to fulfill the duty of fair representation. The chapter highlights the NLRB's inconsistent approach to these issues as well as the split among the circuits. Piatt points out that since the NLRA does not expressly require multilingual election ballots, the Board has overturned elections with English-only ballots in only a few cases. As for the courts, the Fifth Circuit has held that the "laboratory conditions" doctrine requires that foreign language ballots be available when a substantial number of employees do not speak English. In stark contrast, the Seventh Circuit has concluded that employees who do not speak English must learn from other sources how to cast a union election vote. Despite his concern with the approaches of the NLRB and the Seventh Circuit, Piatt suggests that the marketplace is resolving these union-related language issues on its own. Unions are beginning to recognize that non-English speaking workers are an important and growing potential union constituency and that it is in their best interest to organize them.

In Chapters Six and Seven, *Language on the Job* looks to provide both courts and employers with more effective methods of addressing the particular language-on-the-job issues discussed in Chapters Two through Five. The starting point, according to the author, is to develop a fuller understanding

of language as both "a skill and a function of culture and national origin."

Chapter Six revisits the language-on-the-job issues described in the earlier chapters and suggests how courts should analyze them. In reexamining the hiring and promotion cases discussed in Chapter Two, Piatt suggests that the courts should be more sensitive to the possibility that employers are masking their impermissible preference for English-speaking workers with pretextual claims of job incompetence. With regard to the communication among employee cases in Chapter Three, courts should also be more willing to recognize that employers mask their monocultural preferences as the preference of co-workers or customers.

With respect to the cases involving the forced use of bilingual language skills with customers, Piatt emphasizes that language is a skill which employers should have to bargain for and compensate. As for the union-related language issues in Chapter Five, Piatt urges the courts not to permit the situation where Hispanics are unable to participate in union matters due to English-only ballots and meetings.

Practical advice for employers faced with language-on-the-job issues is provided in Chapter Seven. Piatt reasons that, if managers set up English-language training programs on the job to accommodate those workers not proficient in the language, or if they hired supervisors who speak the same language as the employees, it would be in their own best interest. Piatt also recommends educating the entire work force regarding the accommodations and the importance of good will among workers. The author also suggests using role-playing to teach monolingual workers not to resent foreign language workers. Piatt hopes that these techniques can prospectively resolve language-on-the-job problems and thereby avoid litigation.

Language on the Job highlights current issues related to the use of language on the job in the United States. Throughout the book, Bill Piatt identifies how the changing demographics and economics in our nation will require employers, unions and employees to better accommodate non-English speaking workers. He discusses and analyzes the courts' current treatment of language matters in the workplace and then offers a more complex approach, sensitive to both the business needs of employers and the linguistic rights

of non-English speaking and bilingual workers. *Language on the Job* is not a totally complete guide to the language issues facing courts, legislators and managers, but it identifies some of the more pressing problems and attempts to provide practical solutions to them.

Jennifer B. Appel

Justice Antonin Scalia and the Supreme Court's Conservative Moment. By Christopher E. Smith. Westport, Connecticut: Praeger Publishers. 1993. Pp. 160. Hardcover. \$49.95.

With a politically conservative majority of justices sitting on the Supreme Court between 1987 and 1993, why did the Supreme Court shrink from reversing *all* of the constitutional doctrines that Justice Antonin Scalia had long excoriated? That question forms the launching pad for Christopher Smith's foray into the Supreme Court's recent past in *Justice Antonin Scalia and the Supreme Court's Conservative Moment*, in which Smith discusses the extent of Justice Scalia's influence on the Supreme Court. The author's thesis is that Scalia's philosophy, behavior, and stridency contributed to the Court's failure to succumb to the judicial "Putsch" which the Justice fervently championed.

The author begins his analysis by discussing the two ways that justices can exert influence over the Court: through their votes on contentious issues, and through the force of their intellect and personality. Scalia, the author argues, has undoubtedly distinguished himself as a legal scholar. As a former law professor, for instance, Scalia was often noted for expressing forceful, intelligent opinions. Because Scalia's academic credentials cannot be disputed, therefore, the author postulates that Scalia's personality accounts for his inability to influence the Court to the extent that his admirers had predicted when President Reagan appointed him in 1986.

Those predictions were bolstered by the opening of a "window of opportunity" during which conservative appointees to the Court could have completely reversed decisions reached by the Warren and Burger Courts. Smith traces the conservative zenith on the Court to 1987, when President Reagan's appointment of Justice Anthony Kennedy tipped

the balance on the Court in favor of political conservatives. The corresponding nadir of this conservative "moment" came in 1993, when Democrats regained control of appointments to the High Court. Despite a host of conservative decisions handed down during that six-year interim, the author notes that "the essential core of many liberal judicial principles," including the right to abortion and *Miranda* warnings, remained intact. Smith largely attributes the Court's unwillingness to abridge the Fourth and Fourteenth Amendments to Scalia's "strident efforts to push for those outcomes."

Chapter Two briefly examines Justice Scalia's judicial philosophy. Smith suggests that Scalia's overriding goal is to restrain courts from dictating public policy. At the same time, Smith observes that Scalia has joined decisions reinterpreting employment discrimination laws and rules for reviewing habeas corpus petitions, which are both statutory matters traditionally addressed by legislatures. Despite such inconsistencies, the author argues that Scalia is less inclined than other justices to make ad hoc decisions designed to produce outcomes to his liking. He credits Scalia with articulating thoughtful arguments in favor of interpreting the Constitution according to the original *meaning* of the framers' words. He likewise applauds Scalia for his staunch commitment to the doctrine of separation of powers.

More importantly, the author explains how Scalia's judicial philosophy affects his relationship with other justices. On the one hand, Smith notes that Scalia's emphasis on textualism has led him to join the Court's liberals in a number of opinions asserting the right of criminal defendants to confront their accusers. Similarly, Smith recalls that Scalia has opposed random drug testing of U.S. Customs Service employees, and has written that burning the American flag is a form of protected political expression.

Conversely, Smith points out that Scalia has joined numerous conservative opinions restricting access to appellate courts, and narrowing the scope of the Free Exercise Clause. In doing so, according to Smith, Scalia may have alienated natural allies on the Court. For instance, when Chief Justice Rehnquist replaced Justice White, a conservative on crime issues, with Justice Scalia as the circuit justice for the Fifth Circuit, Scalia impolitically rescinded White's policy of granting extensions to death row inmates who were not repre-

sented by attorneys. Similarly, Scalia's majority opinion upholding a life sentence for a minor drug offense prompted even some conservatives to express misgivings about the dramatic implications of his analysis.

The author further examines Justice Scalia's judicial behavior in Chapters Three and Four. These chapters attempt to show how Scalia's stridency undermines his ability to build coalitions on the Court, and unintentionally encourages conservative colleagues to support the very precedents that he opposes most. Here, Smith argues that "justices must engage in strategic behavior that will increase the likelihood that a majority of justices will support their position." To illustrate his point, Smith cites Justice O'Connor's majority opinion in *Tison v. Arizona*,¹ as an example of judicial stewardship. In Smith's view, although her opinion effectively eviscerated the holding of a prior majority opinion written by Justice White, O'Connor deftly garnered Justice White's crucial fifth vote anyway because she at least professed support for his earlier opinion.

In contrast, according to Smith, "the strength of Scalia's belief in the rightness of his views and his professorial style of lecturing his colleagues" actually deters "like-minded colleagues from joining his opinions." The author notes that owing to the secretive traditions of the Supreme Court, however, he offer mostly anecdotal evidence to support his claim. Further, the author recognizes that, "the complex nature of Supreme Court decision making makes its [sic] unwise to seek simple, reductionist explanations for judicial phenomena." Smith maintains that Scalia is nonetheless "a pivotal influence" on the Court.

Justice Antonin Scalia and the Supreme Court's Conservative Moment offers a unique view into the personalities behind the Court. Christopher Smith observes that society should understand how individual justices on the Supreme Court shape law and public policy for the entire nation.

Robert M. Forni Jr.

1. 481 U.S. 137 (1987).

